SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-486

DENNIS GARY MONGER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TOPICAL INDEX

	PAGES
STATEMENT OF THE CASE	1-2
QUESTION PRESENTED	3
ARGUMENT	3-12
CONCLUSION	13
PROOF OF SERVICE	14

TABLE OF CITATIONS
CASES

Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971)	7,8,9,10
Burns v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959)	7
Callendar et al v. Florida, 380 U.S. 519, 14 L.Ed.2d 265, 85 S.Ct. 1325 (1965), 383 U.S. 270, 15 L.Ed.2d 749, 86 S.Ct. 924 (1966)	5
Callendar et al v. State, 181 So.2d 529 (Fla. 1966)	4

TABLE OF CITATIONS
Cases Continued

	PAGES
Cochran v. Kansas, 316 U.S. 255, 86 L.Ed. 1453, 62 S.Ct. 1068 (1942)	7
Dowd v. Cook, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262 (1951)	7
Dresner et al v. Tallahassee, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235 (1963), 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895 (1964)	5
Ell-Gee, Inc. v. Swann, 250 So.2d 850 (Fla. 1971)	4-5
John v. Paulin, 231 U.S. 583 (1913)	6-7
Newman v. Gates, 204 U.S. 89 (1907)	11-12
State ex rel Faircloth v. Cross, 238 So.2d 81 (Fla. 1970)	5
Wells et al v. State, 38 So.2d 464 (Fla. 1949)	5
Wolfe v. North Carolina, 364 U.S. 177, 4 L.Ed.2d 1650, 80 S.Ct. 1482 (1960)	7

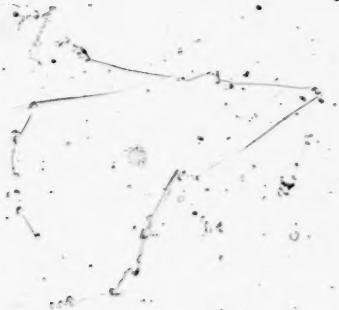
TABLE OF CITATIONS
Continued

PAGES

OTHER AUTHORITIES

Article V, Section 3, Florida Constitution 4

28 U.S.C.A. § 1257 3,4,12



IN THE
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DENNIS GARY MONGER,
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v.

THE STATE OF FLORIDA,
Respondent.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

On April 1, 1970, petitioner was charged by information with two counts of having violated Florida's obscenity statute (Petitioner's Appendix N). Petitioner received a jury trial on both counts. The jury returned guilty verdicts as to both counts on November 3, 1970 (Petitioner's Brief, page 5).

On January 12, 1971, petitioner was adjudged guilty on both counts and was sentenced accordingly (Petitioner's Appendix F). However, prior to the entry of judgment, petitioner filed a notice of appeal. The notice of appeal was directed to the District Court of Appeal of Florida,

First District (Petitioner's Appendix D). On March 18, 1971, petitioner filed a motion for order transferring case to Florida Supreme Court, it appearing that in lieu of the constitutional attack on Section 847.011, Florida Statutes, the jurisdiction of the First District Court of Appeal had been improvidently invoked. On April 7, 1971, the First District Court of Appeal entered an order transferring the cause to the Florida Supreme Court for consideration and determination (Petitioner's Appendix I).

Subsequent to the transferal of the cause to the Florida Supreme Court, the State of Florida filed a motion to dismiss based on the fact that the notice of appeal had been filed prior to the entry of either judgment or sentence (Petitioner's Appendix J). The Florida Supreme Court granted the state's motion to dismiss (Petitioner's Appendix K). Petitioner filed a petition for rehearing in the Florida Supreme Court on June 11, 1971, and the Florida Supreme Court denied this petition on July 6, 1971 (Petitioner's Appendices L and M; Petitioner's Brief, page 10).

QUESTION PRESENTED

WHETHER THE JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED PURSUANT TO 28 U.S.C.A. § 1257(3)?

ARGUMENT

Petitioner has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C.A. § 1257, which provides in part applicable herein as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Respondent submits that the order of the Florida Supreme Court granting the state's motion to dismiss in this cause below is not such "final judgment or decree" rendered by the highest court of a state in which a decision could be had within the meaning of 28 U.S.C.A. § 1257. The only judgment or decision which the Florida Supreme Court rendered in this cause was the decision that the Florida Supreme Court lacked jurisdiction to determine the merits of the appeal. In determining that they had no jurisdiction, the Florida Supreme Court did not reach any federal question which might have been involved in the cause nor did it deny petitioner any federal right properly presented for review. Its decision was simply based on the valid non-federal ground that it lacked jurisdiction in the cause. Callendar et al. v. State, 181 So.2d 529 (Fla. 1966).

In accordance with prior statutes and now according to the Rules of Criminal and Appellate Procedure, promulgated under the authority of the Florida Constitution, Article V, Section 3, the Florida Supreme Court has consistently held:

> "[I]t is clear that the judgment is not rendered for the purpose of an appeal unless it is rendered 'in open court and in writing, signed by the judge and filed' as required by Rule 1.670, Cr.P.R."

Ell-Gee, Inc. v. Swann, 250 So.2d 850 (Fla. 1971). See also: State ex rel Faircloth v. Cross, 238 So.2d 81 (Fla. 1970), and Wells et al v. State, 38 So.2d 464 (Fla. 1949).

The rationale is found in the common sense proposition that until the judgment or sentence or judgment alone is entered and recorded against a defendant there exists nothing to appeal from, and that to accept appellate jurisdiction prior to the entry of a judgment and sentence or judgment would deprive the trial court of jurisdiction to impose same, thus thwarting the administration of justice through orderly adjudication, sentencing and appellate procedure.

It has been the uniform position of this Court to rely on the authority of the Florida Supreme Court to determine its jurisdiction and the jurisdiction of every other Florida court. Dresner et al v. Tallahassee, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235 (1963), 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895 (1964) and Callendar et al v. Florida, 380 U.S. 519, 14 L.Ed.2d 265, 85 S.Ct. 1325 (1965) 383 U.S. 270, 15 L.Ed.2d 749, 86 S.Ct. 924 (1966). This is based on the long-standing rule respected by all courts when the jurisdiction of a sister court is involved.

"As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, we was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

* * * * *

"Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case

turns entirely upon questions of local or general law. . . ." John v. Paullin, 231 U.S. 583 (1913) at page 585. See also: Wolfe v. North Carolina, 364 U.S. 177, 4 L.Ed.2d 1650, 80 S.Ct. 1482 (1960).

Petitioner urges that the dismissal of his appeal by the Florida Supreme Court "does not comport with civilized notions of justice and is fundamentally unfair and violative of the due process clause." The following cases are cited for authority: Burns v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959); Cochran v. Kansas, 316 U.S. 255, 86 L.Ed. 1453, 62 S.Ct. 1068 (1942); Dowd v. Cook, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262 (1951) and Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971). All of these cases are materially distinguishable from the issue raised herein.

Burns v. Ohio, supra, stands for the proposition that a state may not constitutionally require an indigent criminal defendant to pay a filing fee before permitting him to file a motion for leave to appeal to one of its courts. Cochran and Dowd, supra, both involved the equal protection clause of the Fourteenth Amendment when it was claimed that the states involved in these cases, through penal officers, had denied the defendants therein

access to appellate proceedings through suppression of appeal documents or through the enforcement of prison regulations which did not allow the defendants to send out appeal papers until the time for appeal had expired. Boddie v. Connecticut, supra, dealt with welfare recipients who challenged certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, which had the effect of restricting the welfare recipients access to the courts in their attempts to bring actions for divorce. The Court, through Mr. Justice Harlan, held:

> ". . . Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 28 L.Ed.2d at 122.

One additional comment must be made about petitioner's reliance on Boddie v. Connecticut. On page 13 of petitioner's brief, he has attributed to this Court th following comment:

> "Furthermore, the Court summed up the Concepts involved in due process as follows:

> 'In the case at bar, Petitioner will have no hearing on the substantial federal questions, decided adversely to him, raised by his conviction for selling obscene magazines, unless the dismissal of his appeal is treated as a final judgment. Not to do so would sustain the State of Florida's denial to Petitioner of his right to appeal where there is not sufficient countervailing justification for the State's action. Boddie v. Connecticut, supra, at 377."

Respondent has gone through the Boddie opinion with a diligence nigh unto fanaticism and has been utterly unable to find such a remark made by this Court. Assuming arguendo that the Boddie decision is of some due process benefit to petitioner, reliance by him on the above-quoted comment attributed to this Court is clearly misplaced.

Respondent would suggest that it was the actions of petitioner through counsel which led to his present dilemma. The State of Florida through its Constitution and the Rules of Court enacted pursuant thereto and through state judicial construction of said rules has established an orderly and non-discriminatory procedure for perfecting appeals within its appellate court system. The system is designed and maintained to afford each and every defendant his right to due

process of law in a manner consistent with the orderly administration of justice. The state has a valid interest in protecting the rights of all its citizens, and, in so doing, Florida has attempted to avoid chaotic and haphazard appellate proceedings. Indeed, the Boddie opinion recognized this very concept:

> "Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system,' social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.'" 28 L.Ed.2d at 117

Respondent is cognizant of the fact that the petitioner has raised additional points for review in his brief, but since those issues were not properly presented to the Florida Supreme Court for appellate review, and disposed of, the additional issues are not now properly before this Court.

> ". . . . Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when

> rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting." Newman v. Gates, 204 U.S. 89 (1907) at page 95.

In the unlikely event this Court concludes for purposes of due process or for any other reason that the Florida Supreme Court erroneously declined to take jurisdiction in this cause or that the Florida Appellate Rules in accordance with the Florida Constitution are invalid, or that the dismissal of the appeal by the Florida Supreme Court constituted a "final judgment or decree" within the meaning of 28 U.S.C.A. § 1257, respondent will be more than willing to argue the additional issues raised by the petitioner, at the appropriate time and in the appropriate forum.

CONCLUSION

For the reasons and authorities herein expressed, the writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent has been furnished petitioner's counsel, Honorable Robert Eugene Smith, Suite 507, The Alex. Brown & Sons Building, Towson, Maryland, 21204; Honorable D. Freeman Hutton, Suite 2005, 1175 Peachtree Street, N.E., Atlanta, Georgia, 30309 and Honorable Paul Shimek, Jr., 517 North Baylen Street, Pensacola, Florida, 32502, by Mail, this _____ day of January, 1972.

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OF COUNSEL FOR RESPONDENT